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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

FREDRIC D. LEFFLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

In addition to Petitioner and Respondent were co-defendants Kelly Johnston, David Uhrich, and Walter P. Hammond, Jr.

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Petitioner, Frederic Leffler, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit was issued on June 1, 2007. (App. 1). The Order of the United States District Court for the District of Maryland was issued on April 29, 2005. (App. 30)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 1, 2007. (App. 1). This petition is filed within 90 days of entry of judgment. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

FEDERAL RULE INVOLVED

Fed. R. Crim P. 14

Rule 14. Relief from Prejudicial Joinder

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

INTRODUCTION

In this case, Petitioner, Fred Leffler, an attorney, was tried with his former client, co-defendant Kelly Johnston. While the government's physical and testamentary evidence showed that Johnston committed illegal acts, the case against Leffler was based upon inferences and circumstantial evidence of guilty knowledge. Johnston, unrestrained by the limitations and standards applied to the government, relentlessly pursued a defense calculated to exculpate her by attacking and convicting Leffler. First, during the government's case in chief, Johnson ambushed Leffler with expert testimony that, while proffered to rebut the government's allegations against her, instead introduced evidence against Leffler that was completely irrelevant to the government's charges and inadmissible if offered by the government.

As the trial progressed, the evidence cumulated against Johnston. After Leffler rested his case and was prohibited from responding, Johnston took the stand and admitted that she had, in fact, committed the acts alleged, but that she acted on the advice of her attorney, Fred Leffler. Thus, by presenting the affirmative, advice of counsel defense, Johnston forced a jury decision between the two co-defendants: If the jury believed that Leffler advised

his client to commit illegal acts, it was compelled to convict Leffler, but to acquit Johnston. In the end, the jury acquitted Johnston on 13 of 19 counts and convicted Leffler on all counts.

STATEMENT OF THE CASE

A. Trial Court Proceeding

Petitioner Frederic Leffler, an attorney, represented a real estate title company that was owned by his client and co-defendant, Kelly Johnston. Other co-defendants were David Uhrich, and Walter P. Hammond, Jr. At trial, the Government presented a case of mortgage fraud in which it billed Defendant Walter Hammond as the "mastermind" and "generator of the criminal activity."[1]

Hammond's scheme played out as follows: Through a limited liability company, Guardian Foundation, LLC ("Guardian"), Hammond agreed to purchase run down Baltimore City rental houses for prices that averaged $5,000 - $15,000 per house. Hammond and co-defendant David Uhrich recruited a number of "investors" who, in exchange for a payment from Hammond of $1,000 - $2,000 per house, agreed to make application for mortgage loans and to represent

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[1] Two weeks into the six week long trial, Hammond suddenly pled guilty and, under a plea agreement with the Government, testified at length about his real estate "flipping" scheme and his defrauding of lending institutions.

themselves as "buyers" of the houses. Settlement on Hammond's purchase of a house and on his subsequent sale of the same house to an "investor" usually took place on the same day, at the title company owned by co-defendant Johnston.

Hammond promised his "investors" that he would pay all expenses (down payment, closing costs, and mortgage payments), manage the rental houses, and collect rents. The "investors" paid nothing. Eventually, Hammond promised, he would transfer the properties into the name of a corporation in his control. Hammond stopped making the mortgage payments and the loans went into default.

At the heart of Hammond's fraud was the mortgage loan. Hammond secured fraudulent appraisals, inflating the value of the subject houses several times. Mortgage brokers, working with Hammond, created fraudulent mortgage applications, which were submitted to lenders along with the fraudulent appraisals. Thus, for example, a house that Hammond purchased for $5,000 was represented on a loan application as having a value of $40,000. In turn, a lender would advance 80% of the property's value, which Hammond pocketed. At settlement, Hammond himself arranged for the down payment, supplying the "investor" with a cashiers' check in the amount of the 20% down payment required.

At first, Hammond used the proceeds from earlier property sales as the source of down payment funds. Eventually, Hammond testified, Defendant Kelly Johnston, title company president, informed

him that certain lenders did not require a cashier's check at settlement. Armed with this information, Hammond simply "netted out" the transaction, reducing the loan proceeds by the down payment amount. At other times, Hammond testified, Johnston took money from the borrower's escrowed loan proceeds in advance of settlement, cutting a check from the title company escrow account to Hammond's company in the amount of the down payment. Hammond then took the title company check to a nearby bank, deposited it into his account, purchased a certified check for the down payment amount, and brought the cashier's check back to the settlement table, making it appear that his "buyer" had made the required down payment. It was in this illegal use of title company escrow funds that co-defendant Johnston was thoroughly implicated.

Testimony of Co-Defendant Johnston's Handwriting Expert

To prove that Kelly Johnston wrote checks from the title company escrow account to Hammond's company for the purpose of allowing the "investors" to make down payments at settlement, the Government produced a number of the checks. To counter the Government's evidence showing Johnston's signature on these incriminating checks (drawn on the Performance Title Company escrow account and made payable to Walter Hammond) Johnston named a handwriting expert to analyze the checks and to testify that certain signatures were not hers. As Johnston's lawyer explained to the Court: "[The Government] intends to introduce certain documents; and they're going to claim Ms.

Johnston signed those documents. * * * Ms. Johnston didn't sign those documents. . . . I'd like to have a witness say, it's not even close."

To accommodate the expert's schedule, Johnston's handwriting expert appeared during the Government's case in chief. Lawyers for Johnston's co-defendants were given the expert's report for the first time at the moment Johnston's expert took the witness stand.[2] The expert testified that she had examined purported signatures of Defendant Johnston on a number of title company checks and, after comparing those signatures to known exemplars of Johnston's signature, the expert questioned the authenticity of Kelly Johnston's signatures.

As the expert's testimony unfolded, it became clear that the checks upon which she had been asked to opine were *not* checks relied upon by the Government and had nothing whatsoever to do with the Government's allegation that Johnston had improperly drawn title company escrow checks to Hammond. Rather, the checks reviewed by Johnston's expert were drawn on the title company *operating account* and made out to Arch Property

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[2] That these matters had been handled between Johnston and the Government seemed, at the time, unremarkable, as the issues to be addressed by the expert (as represented by Johnston's lawyer) were to relate only to Johnston's exculpatory allegation that her signature on incriminating checks had been forged.

Services, Inc., an entity wholly owned by Petitioner Fred Leffler.[3]

In fact, none of the checks questioned by the expert were among those relied upon by the Government. The alleged inauthentic checks had nothing to do with, and were completely irrelevant to, the Government's case. Nonetheless, the evidence was overwhelmingly prejudicial to Leffler, in that it suddenly and unexpectedly suggested that checks payable to his company might have borne forged signatures.

Having reviewed the expert's report (which review was denied to Leffler), the Government opportunistically pounced, driving home on cross-examination of the expert a completely new and uncharged accusation – that checks written to Leffler's company contained questionable, and perhaps forged signatures.

Because he had not received the expert's report in advance of her testimony and thus, had learned for the first time during her testimony that all of the checks at issue were from the title company operating account and had nothing to do with Walt Hammond, Leffler's counsel told the Court: ". . . I have been sandbagged . . . on an antagonistic

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[3] Leffler's legitimate fees for document preparation and other services were paid to Arch Property Services, Inc., an entity undisputedly owned by Leffler. One of the Government's theories was that payments of Leffler's fees to Leffler's company was somehow a badge of fraud.

defense that I never saw coming and certainly couldn't have seen coming as I was handed this report at the same time the jury was handed it."[4]

Even the prosecutor (although certainly delighted) was somewhat taken aback, remarking at sentencing that "everyone was surprised at what his handwriting expert had to say about Mr. Leffler, because [Johnston's counsel] didn't produce any discovery to [Leffler's attorney]." In response, the Court recognized that Johnston's expert had put Leffler in a "very precarious position," stating:

> . . . you are in a difficult position in terms of the cross-examination by the government, which has now laid the foundation, among other things, for an argument that Mr. Leffler had a kind of involvement here that up until now at least, frankly, I don't think there was much evidence for.
> Now, there is a basis in this record for an argument that Mr. Leffler forged Ms. Johnston's signature.

When counsel for Johnston claimed that he had no intention of arguing that Leffer had forged checks, the Court replied: "*you don't have to argue*

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[4] The Court agreed, later remarking to Leffler's counsel: "the whole issue that you quite properly address in your [severance] memorandum about the signature issue on the operating account. I agree with you that that was really a -- well, *you could not possibly have anticipated that*." (Emphasis added).

that Mr. Leffler forged that signature for the inference to be hanging out there to the jury that Mr. Leffler was culpably involved with somebody in ripping off Performance Title." (Emphasis added). Furthermore, the Court stated, "Mr. Smith [Leffler's lawyer] should have been told what he was not told, namely that some of the checks that [the expert] was shown and on which she bases her conclusion, were checks payable to Mr. Smith's client."

Co-Defendant Johnston's Testimony

Throughout the trial, the Court imposed a strict order in which defendants cross-examined Government witnesses and then put on their respective cases. Once a defendant completed cross-examination of a witness he or she was not allowed re-cross. When a defendant rested his or her case, the trial court allowed no additional presentation or evidence. In this order, Leffer was next to last; Johnston was last.

Leffler rested his case without testifying. Defendant Kelly Johnston then took the stand and testified – bluntly and expansively – that she had, in fact, committed criminal acts, but that she had done so only on the advice of her lawyer, Petitioner Fred Leffler. Among other things,[5] she testified that Leffler had approved, on a number of occasions, her

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[5] Johnston even dovetailed her testimony with that of her handwriting expert, pointing out that "I found that someone had signed my name to a couple of checks, . . . I noticed it, I believe, *on the operating account* . . .." (Emphasis added).

disbursement of loan proceeds to Hammond before settlement, by way of a check from escrow, in order that Hammond could take that check to his own bank and come back to the settlement table with down payment funds.

To buttress her story, Johnston testified that, at the time Petitioner Fred Leffler advised her to break the law, others were present, namely title company employees Susanne Lokey and Ann Morris Chaillou. But when Ann Morris testified earlier, as a witness for Johnston, she was asked about none of this. Nor was Susanne Lokey, who also testified earlier, on behalf of Fred Leffler. Thus, by virtue of the order in which the Defendants presented their cases, Johnston was able to testify with impunity, knowing that Leffler had rested and that the Government had no incentive whatsoever to recall these witnesses in rebuttal.

Arguing that he had been "ambushed" by the Johnston testimony, counsel for Fred Leffler asked for leave to re-open his case. The Court acknowledged the novel issue presented:

> The fact of the matter is to have co-defendants in the context of sort of a business fraud prosecution where defendant number 3, Ms. Johnston, is the client of defendant number 2, who is an attorney and was the attorney for defendant number 3. That's a unique situation, and I think unique situations call for unique responses.

When Johnston's attorney argued that the testimony he had just elicited was "not particularly crippling" to Leffler, the Court replied:

> I think it has been *absolutely devastating*, . . . It's not up to me, but it has been absolutely devastating. *Absolutely devastating*. It may be that I will have to write an opinion about this.

(Emphasis added).

The Court went on:

> *What we have here is not just defendants pointing the finger at each other*, but we have a case in which the client of a defendant, who is an attorney, puts on her case last, where that defendant has elected not to testify and, indeed, put on no substantive evidence really to speak of, where Ms. Johnston now gets on and says Mr. Leffler did the whole thing, it was all Mr. Leffler.

(Emphasis added).

The next trial day, Leffler submitted a Renewed Motion for Severance, supplementing his earlier motion. After argument, the Court rejected severance and also rejected Leffler's request to re-open his case or to present a rebuttal case. Instead, the Court simply allowed a reversal of the order of the co-defendants' closing arguments.

Johnston's Closing Argument

In closing, Kelly Johnston's counsel again donned his "second prosecutor" hat, portraying Johnston as having done *nothing* without the advice of her lawyer: "[Kelly Johnston] looked to Fred Leffler," who "embraced" Hammond's fraudulent scheme. "What more could she rely on? where did she have to go for advice?" "If there were questions of law, she asked her lawyer." Furthermore, argued counsel, "Fred Leffler taught Kelly how to do those transactions . . . When Hammond wanted to use proceeds to get a check, Kelly asked Leffler, and he approved it."

Johnston was completely reliant upon Leffler, argued counsel: "If she needed advice, she asked her lawyer." "He was aware about what was going on." "Did Kelly Johnston know there was a crooked scheme? Kelly knew there was a business plan blessed by her lawyer."

The effect was devastating to Leffler. By confessing to the *actus reus* of crimes, but denying *mens rea* by way of the affirmative advice-of-counsel defense, Defendant Johnston exculpated herself at Leffler's expense. And to be sure, Johnson's lawyer stressed the point in closing: "Reliance upon her attorney's advice negates the fraudulent intent, even if the advice is wrong." "She relied on her lawyer's advice. No intent." "She said, is this right?" "She was told yes."

And, it appears, the jury at least partially believed Johnston's testimony that Leffler counseled his client to break the law, as it acquitted Johnston on 13 of 19 counts while convicting Leffler on all. At sentencing, the Court remarked: "*There is a rational explanation . . . of the jury's fact finding here. I think Ms. Johnston made a very compelling case in casting blame on Mr. Leffler.*" Arguing at sentencing that his client should be given some credit for assisting the government, Johnston's lawyer argued: "The most damaging witness against Fred Leffler was Kelly Johnston. She got them their conviction."

B. Procedural History

By superseding indictment, Petitioner Frederic Leffler was charged with six counts of mail fraud, in violation of 18 U.S.C. § 1341 and eleven counts of wire fraud, in violation of 18 U.S.C. § 1343. His initial appearance in the United States District Court of Maryland was on June 26, 2003. On May 27, 2004 after a six week trial, a jury returned guilty verdicts against Mr. Leffler; and on April 29, 2005, the District Court imposed a 37 month sentence. Mr. Leffler noted a timely appeal on May 5, 2005 and on May 18, 2005, the Fourth Circuit Court of Appeals consolidated Leffler's appeal with those of his co-defendants, David Allen Uhrich and Kelly Johnston. After oral argument on December 1, 2006, the Fourth Circuit entered judgment, affirming Petitioner's convictions, on June 1, 2007.

C. Court of Appeals Opinion

In a conclusory, three page opinion[6] the Fourth Circuit affirmed the District Court, reciting the familiar refrain of having weighed the "possible prejudice to the accused" against the "avoidance of needlessly duplicative trials." Appendix at 16.

On the issue of the co-defendant Johnston's handwriting expert, who testified for no purpose other than to smear Leffler on matters outside the indictment, the Court noted that "neither the government nor Johnston suggested that Leffler forged the checks." *Id.* But this ignores even the trial Court's on the ground observation: "you don't have to argue that Mr. Leffler forged that signature for the inference to be hanging out there to the jury that Mr. Leffler was culpably involved with somebody in ripping off Performance Title."

Event acknowledging the conflict between Leffler's defense that he lacked knowledge of Johnston's illegal activity (namely, the improper use of escrow funds) and Johnston's defense, spelled out in ter testimony that she committed criminal acts on the advice of her lawyer, Leffler, the Court found, without explanation, that Leffler failed to demonstrate a conflict of defenses with his co-defendant that would justify severance.

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[6] The Court's opinion addresses the appeal issues raised by all three co-defendants in the consolidated appeal.

REASONS FOR GRANTING THE WRIT

This Court has not visited the areas of prejudicial joinder and severance since *Zafiro v. United States*, 506 U.S. 534 (1993), where the Court considered the question, "whether Rule 14 requires severance as a matter of law when co-defendants present 'mutually antagonistic defenses." *Id.* at 535. There, while rejecting the adoption of such a *per se* rule, the Court acknowledged a range of circumstances in which mutually antagonistic defenses might mandate severance, "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. For example, stated the Court, "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." And, "when many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened." *Id.*

The facts of *Zafiro*, however, did not remotely present such circumstances. 506 U.S. at 540. There, when two co-defendants in possession of a large box were approached by federal agents, they dropped the box and ran into an apartment. Agents in pursuit found drugs in the apartment and in the dropped box. Both co-defendants claimed to be innocent bystanders who knew nothing of box's contents or the illegal drugs in the apartment.

Concurring in the *Zafiro* decision, Justice Stevens observed that there, the co-defendants defenses were consistent: it was entirely possible for the jury to believe both defendants in their assertion of "dual ignorance" - - that neither had knowledge of the contents of the box. And significantly, nothing in either co-defendant's defense supplemented the government's proof of any defendant's guilt in any way. *Id.* at 542. As a result, explained Justice Stevens, the *Zafiro* Petitioners could establish no prejudice flowing from the trial court's denial of severance. Significantly, however, Justice Stevens opined that the Court must "save for another day evaluation of the prejudice that may arise when the evidence or testimony offered by one defendant is truly irreconcilable with the innocense of a co-defendant." *Id.* at 543. The "very different situation" that concerned Justice Stevens is where "mutually exclusive defenses transform a trial into more of a contest between the defendants than between the people and the defendants." *Id.* at 543. (citations omitted).

In such a case, "joinder may introduce what is in effect a second prosecutor into a case, by turning each co-defendant into the other's most forceful adversary." *Id.* Furthermore, "[t]he existence of this extra prosecutor is particularly troublesome, because defense counsel are not always held to the limitations and standards imposed upon the government prosecutor." 506 U.S. at 5444 n.3 (citing *United States v. Tootick*, 952 F.2d 1078, 1082 (9th Cir. 1991); *United States v. Romanello*, 726 F.2d 173 (5th Cir. 1984)).

In the years following *Zafiro*, Courts deciding issues of severance have tended to look no further than the *Zafiro* Court's expression of a "preference in the federal system for joint trials of defendants who are indicted together,"[7] *Zafiro*, 506 U.S. at 537. Many courts seem to have misread *Zafiro*, understanding its holding to mean that antagonism between defendants can never justify severance. *See, e.g., United States v. Mietus*, 237 F.3d 866, 874 (7th Cir. 2001)("we are not convinced that *Romanello's*[8] holding that prejudice in a joint trial can be shown when one defendant strongly attacks another survives *Zafiro*"). Other courts have held that, to require severance, defenses must be mutually exclusive at a level higher than that envisioned in *Zafiro*. *See United States v. Woods*, 210 F.3d 70, 79 (1st Cir. 2000)("the antagonism . . . must be such that if the jury believes one defense, it is *compelled* to convict the other defendant")(emphasis in original)(citations omitted).

Still other different standards have emerged. *See United States v. Solomon*, 2007 U.S. Dist. LEXIS 30511 (D. Pa. 2007)(Mutually exclusive defenses exist when "one person's claim of innocence is

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[7] In this case, during oral argument in the Fourth Circuit, the Court asked only one question. Addressing the Government, the court posed what was seemingly the dispositive inquiry: "weren't the defendants indicted together?"

[8] *United States v. Romanello*, 726 F.2d 173 (5th Cir. 1984), cited in Justice Stevens' Zafiro concurrence.

predicated solely on the guilt of a co-defendant").[9] And, while the "second prosecutor" concern, voiced in Justice Stevens' *Zafire* concurrence, continues to enjoy some currency, *see United States v. Volpe*, 42 F. Supp. 2d 204, 210 (E.D.N.Y. 1999)(severance may be requited where, "in effect, a defendant's counsel becomes a second prosecutor. . . ." (quoting *United States v. Tootick*, 952 F.2d 1078 (9th Cir. 1991)) (internal quotations omitted), other opinions question the continued vitality of the theory. *See United States v. Buena-Lopez*, 987 F.2d 657, 660-61 (9th Cir. 1993); *see also United States v. Balter*, 91 F3d 427, 434 (3d Cir. 1996)(after *Zafiro*, no severance based on *Tootick* "second prosecutor" theory).

This petition presents a stunning example of the scenario that concerned Justice Stevens, and thus presents the court with a vehicle by which to refine the general rule of *Zafiro* and to provide guidance and consistency in a case where one co-defendant's adversarial stance generates trial conditions so prejudicial to the defendant under attack as to deny a fair trial.

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[9] This standard, of course would have spelled severance for Leffler.

This case illustrates the sort of antagonist defenses which, if left unchecked, build throughout the trial toward an unfair degree of prejudice.[10] Petitioner Fred Leffler's co-defendant and former client first called a expert handwriting expert, not to exculpate herself by casting doubt on incriminating documents bearing her signature, but only to smear Leffler with the suggestion that Johnston's signature might have been forged on certain checks where the payee was a corporation owned by Co-Defendant Leffler – a matter never alleged by the Government and not a part of the case against Leffler. Then, Johnston vigorously pursued an affirmative, advice of counsel defense, admitting that she committed illegal acts, but claiming to have done so only on the advice of her lawyer. This truly is a case where Johnston's defense, if believed,[11] required the jury to convict Leffler in order to acquit Johnston.

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[10] A trial court has a "continuing duty at all stages of the trial to grant severance if the requisite degree of prejudice appear[s]." *Schaffer v. United States*, 362 U.S. 511, 516 (1960).

[11] Indeed, it appears that the jury did believe Johnston to some degree, acquitting her on most counts while convicting Leffler on all.

CONCLUSION

Over a decade after *Zafiro*, it is desirable that this Court take up the question reserved by Justice Stevens and to guide lower courts in balancing judicial efficiency with fairness to defendants who face a greater and less restrained attack from a co-defendant than from the government

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Dated: August 30, 2007

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED
June 25, 2007

No. 05-4486
CR-03-10

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

DAVID ALLEN UHRICH
Defendant - Appellant

No. 05-4487
CR-03-10

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

KELLY J. JOHNSTON
Defendant - Appellant

No. 05-4490
CR-03-10

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

FREDRIC D. LEFFLER
Defendant - Appellant

MANDATE

The judgment of this Court, entered 6/1/07, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/ s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-4486

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DAVID ALLEN UHRICH,

Defendant - Appellant.

No. 05-4487

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

KELLY J. JOHNSTON,

Defendant - Appellant.

No. 05-4490

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FREDRIC D. LEFFLER,

Defendant - Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge. (CR-03-10)

Argued: December 1, 2006 Decided: June 1, 2007

Before WILKINS, Chief Judge, WILKINSON, Circuit Judge, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Norman L. Smith, FISHER & WINNER, Baltimore, Maryland; Richard Christopher Bittner, Glen Burnie, Maryland; Andrew Radding, ADELBERG, RUDOW, DORF & HENDLER, L.L.C., Baltimore, Maryland, for Appellants. Joyce Kallam McDonald, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** Gregory M. Kline, ADELBERG, RUDOW, DORF & HENDLER, L.L.C., Baltimore, Maryland, for Appellant Kelly J. Johnston. Jeffrey E. Nusinov,

FISHER & WINNER, Baltimore, Maryland, for Appellant Fredric D. Leffler. Rod J. Rosenstein, United States Attorney, Stephen M. Schenning, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kelly J. Johnston, Fredric D. Leffler, and David A. Uhrich were convicted of charges relating to a scheme to defraud mortgage lenders. Johnston brings her appeal asserting that the district court erred by: 1) upholding the Magistrate Judge's probable cause determination and denying her motion to suppress certain evidence; 2) mismanaging discovery in the case and denying her motion for a continuance; 3) denying her motion to sever; 4) denying her motion for a new trial; 5) denying her motion for judgment of acquittal; 6) incorrectly calculating the amount of loss attributable to her; and 7) allowing the government to ignore its statutory obligations regarding restitution. Leffler also argues that the district court erred in denying his motion to sever.

In Uhrich's appeal, he contends that the district court erred by 1) admitting evidence of certain real estate transactions and 2) sentencing him in violation of the Sixth Amendment to the Constitution.

We disagree with the arguments made by Appellants and, thus, for the reasons stated below, affirm the judgment of the district court.

I..

This case arises out of a scheme to defraud mortgage lenders, organized and led by Walter P. Hammond. From 1997 through 1999, Hammond purchased over 200 properties from long time Baltimore landlords who wished to sell all or part of their portfolios of rental row houses. (J.A. at 1373.) Hammond found investors who agreed to become "buyers" of the houses in exchange for a payment from Hammond of $1,000 to $2,000 per house. The price of the houses averaged between $10,000 and $15,000 per house, and Hammond typically sold the houses for $40,000. (J.A. at 1362.) The mortgage lenders believed they were financing the purchase of the properties by loaning eighty percent of the purchase price of a house to a buyer/investor who was putting up twenty percent of the purchase prices. (J.A. at 815, 1004, 1013, 1306-07, 1328.)

Hammond's scheme revolved around the mortgage loan. The purchase prices of the houses were supported by false appraisals. (J.A. at 1363, 1369, 1508, 1511.) The appraisals were artificially inflated through the use of comparable houses which, in fact, were out of the neighborhood or purchased at inflated prices in other schemes to defraud. (J.A. at 1093, 1363.) Mortgage brokers, working with Hammond, created fraudulent mortgage applications, listing false information.

(J.A. at 1368-69.) These applications were submitted to lenders along with the inflated appraisals.

Settlement on the sale of a house to Hammond and on the subsequent sale of the same house from Hammond to an investor usually took place on the same day. One hundred forty five of Hammond's properties were settled at Tower Title and Performance Title, two title companies run and owned by Co-Defendant Kelly J. Johnston. (J.A. at 1727-28.) Co-Defendant Fredric D. Leffler served as the title companies' lawyer. (J.A. at 1727-28.)

At settlements, investors promised the lenders to pay the mortgages, while Hammond promised the investors that they did not have to pay the mortgages. Hammond supplied the investors with cashier's checks in the amount of the down payment required at the settlement table. At first, the down payment funds came from Hammond's earlier property sales. (J.A. at 1378.) However, certain lenders did not require a cashier's check at settlement. For such lenders, the down payment funds were provided for in one of two ways. At times, the loan proceeds paid to Hammond were reduced by the down payment amount. At other times, Johnston and/or Leffler directed the title company employees to break the escrow and advance to Hammond lender funds which he then used to purchase a cashier's check in the name of the investor. (J.A. at 1379-81.)

Hammond utilized Co-Defendant David A. Uhrich to locate investors and agreed to pay Uhrich a referral fee for any investors Uhrich recruited. (J.A. at 1365.) When one such investor did not have

sufficient income to qualify for a mortgage loan, Uhrich suggested that she inflate her income on loan applications by falsely using his company as her employer to add additional income. (J.A. at 1112-13.)

Uhrich borrowed $70,000 from another investor, Annette Porter, to be used for the purchase of a house at 9499 Coral Crest Way, Vienna, Virginia. (J.A. at 682-84, 715-16.) Uhrich was to repay the $70,000 in three months. (J.A. at 682-84.) However, he was unable to pay the money back. Instead, Uhrich offered Porter an investment opportunity to make some money by becoming an investor in Hammond's scheme. (J.A. at 686.) Uhrich told Porter they could open an account together and split the money paid by Hammond. (J.A. at 689.)

Additionally, Uhrich and Hammond found large homes in which they wished to live and titled the homes in the name of a fictional buyer, Leandro Rivas. (J.A. at 715-16.) The homes were at 751 Intrepid Way, Davidsonville, Maryland, and at 9499 Coral Crest Way, Vienna, Virginia. Hammond diverted proceeds from his scheme to help purchase these homes, and Uhrich provided the loans and the name Leandro Rivas.

Johnston was indicted on eighteen counts of mail and wire fraud, convicted of five counts, sentenced to a period of imprisonment of 27 months, and ordered to pay approximately $57,000 in restitution, among other penalties. Leffler was indicted on seventeen counts of mail and wire fraud, convicted of all counts, and sentenced to a period of imprisonment of 37 months. Uhrich was indicted on

four counts of mail and wire fraud, convicted of three counts, sentenced to a period of imprisonment of 33 months, and ordered to pay a $300 Special Assessment and approximately $82,000 in restitution. Each of these co-defendants now appeals.

II.

Johnston contends that the district court erred in upholding the Magistrate Judge's probable cause determination and denying her motion to suppress certain evidence. We disagree.

A.

Although we make a de novo review of the denial of the motion to suppress by the district court, the finding of probable cause by the Magistrate Judge is entitled to great deference from this Court. United States v. Wilhelm, 80 F.3d 116, 118-19 (4th Cir. 1996) . Hence, our responsibility today is merely to make certain that the Magistrate Judge "had a substantial basis for concluding that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238-39, (1983) (alteration marks, internal quotation marks, and citation omitted).

Search warrants must particularly describe the place to be searched and the items to be seized. Andresen v. Maryland. 427 U.S. 463, 480 (1976)." [F]ishing expedition[s]" or "a random exploratory search or intrusion" in violation of the "particularity" requirement of the Fourth Amendment are

disallowed. United States v. Owens, 848 F.2d 462, 466 (4th Cir. 1988).

The Fourth Amendment mandates that there be probable cause to support that seizable items will be found in the place that is to be searched before a search warrant can properly issue. United States v. Wylie, 705 F.2d 1388, 1391-92 (4th Cir. 1983). Probable cause is "a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238.

"[I]nvalidation of an entire search based on a seizure of items not named in the warrant is an extraordinary remedy that should be used only when the violations of the warrant's requirements are so extreme that the search is essentially transformed into an impermissible general search." United States v. Robinson, 275 F.3d 371, 382 (4th Cir. 2001) (citation and internal quotation marks omitted).

"A valid search warrant may issue only upon allegations of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." United States v. McCall, 740 F.2d 1331, 1335-36 (4th Cir. 1984) (internal quotation marks omitted).

B.

The search and seizure at issue here was made pursuant to a search warrant issued by the Magistrate Judge, whose probable cause

determination was based upon the affidavit of FBI Special Agent James Costigan.

Johnston asserts that the government failed to comply with the particularity requirements outlined by this Court. According to Johnston, the affidavit contains broad descriptions of documents to be seized, with no effort made to tailor the description of documents that would prove a criminal act.

Our review of the record, however, convinces us otherwise. The affidavit in question goes to great length to detail: 1)the actions of the appraiser and the mortgage broker in the scheme to defraud, (J.A. 110-11); 2) information concerning the HUD-1 settlement documents (J.A. 112), including the identity of the investors and details concerning their statements that they had provided no funds at settlement (J.A. 114-5, 121, 126-7, 133, 138-9); 3) the location where the settlements at issue occurred (J.A. 114, 126, 132, 136, 163-4); 4) the identity of the employees of the title companies (J.A. 107, 114) ; 5) the employees who allegedly conducted settlements with false HUD documents (J.A. 112, 114, 136), and 6) information regarding the relationship of Performance Title as the successor of Tower Title. (J.A. 149.)

Therefore, contrary to Johnston's contentions, it is hardly disputable that probable cause existed for the Magistrate Judge to find that evidence of fraud would be found at both of the title company locations. Johnston next argues that the handwritten interlineations in the affidavit

supporting the search warrant evidence that the Magistrate Judge ceased being "neutral and detached." We cannot agree.

Simply stated, Johnston's bare allegation that the interlineations demonstrate that the Magistrate Judge lacked objectivity, without more, is an insufficient basis for us to find that the search warrant was invalid. In fact, and as posited by the government, we are of the firm belief that the interlineations in the affidavit establish not that the Magistrate Judge ceased being "neutral and detached" but instead that the Magistrate Judge carefully considered the affidavit before deciding whether to issue the search warrant.

As to Johnston's contentions that the evidence seized was not described with particularity and that too much time had passed between the alleged crime and the search, we are unconvinced. Our review persuades us that the subject search warrant was sufficiently narrow in that it permitted the seizure of documents associated only with Hammond, his corporations and his investors. Accordingly, Johnston's particularity argument fails.

Concerning Johnston's staleness argument, we have earlier held that "t]he vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit." McCall, 740 F.2d at 1336 (quoting United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972)). "Rather, we must look to all the facts and circumstances of the case, including the nature of the unlawful activity

alleged, the length of the activity, and the nature of the property to be seized." Id.

The circumstances here are similar to those presented in United States v. Farmer, 370 F.3d 435, 439 (4th Cir. 2004), in that "all of the circumstances pointed toward a finding of probable cause." The allegations were "not mere isolated violations of the law, but criminal activities of a protracted and continuous nature." Id. (alteration mark, citation, and quotation marks omitted). Accordingly, Johnston's staleness argument also fails.

III.

Johnston alleges that the district court erred by mismanaging discovery and denying her motion for a continuance. This argument is meritless.

A.

"Discovery matters are committed to the sound discretion of the district court and an error in administering the discovery rules is reversible only on a showing that the error was prejudicial to the substantial rights of the defendant." United States v. Barnes, 634 F.2d 387, 390 (8th Cir. 1980) (citation omitted).

The denial of a continuance is improper only when there is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay. ..." Morris v. Slappy, 461 U.S. 1, 11-12 (1983) (citation and internal quotation marks omitted). Because the trial court

enjoys great latitude in managing its time, we review decisions regarding the trial calendar for abuse of discretion. Id. at 12.

B.

Although the frustrations of defense counsel may be understandable, Johnston has failed to provide any argument as to how she was harmed by the government's alleged discovery abuse. Thus, because she has neglected to set forth that she was provably prejudiced by the government's alleged violations, we are unable to find that the district court erred in managing the discovery in the instant matter.

Regarding Johnston's motion for a continuance, Johnston has again failed to argue how she was prejudiced by the district court's denial of the request. Moreover, there is no evidence in the record that the district court possessed "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay. ..." Morris, 461 U.S. at 11-12 (citation and internal quotation marks omitted). Consequently, we are unable to conclude that the district court improperly denied the motion.

IV.

Johnston and Leffler aver that the district court erred in denying their motions to sever. We are unconvinced.

A.

The district court's decision to deny a motion to sever will not be overturned "absent a showing of clear prejudice or abuse of discretion." United States v. Acker, 52 F.3d 509, 514 (4th Cir. 1995) (citation omitted).

Rule 14(a) provides that, " [i] f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a).

"In ruling on a motion for severance, the trial court is vested with discretion; it must carefully weigh the possible prejudice to the accused against the often equally compelling interests of the judicial process, which include the avoidance of needlessly duplicative trials involving substantially similar proof." United States v. Jamar, 561 F.2d 1103, 1106 (4th Cir. 1977) (citing United States v. Isaacs, 493 F.2d 1124, 1160 (7th Cir. 1974)). "The exercise of this discretion will be overturned only for clear abuse affecting substantial rights of the accused." Id. (citing Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948)) .

The district court has a "continuing duty at all stages of the trial to grant severance if the requisite degree of prejudice appear [s]." United States v. Spider, 800 F.2d 1267, 1273 (4th Cir. 1986 (citation omitted).

B.

Johnston makes two arguments as to how the district court erred in denying her motion to sever. First, she maintains that she was tried with multiple defendants regardless of her minor and passive role in the alleged scheme. According to Johnston, much of the evidence presented at trial against Johnston's co-defendants was totally unrelated to her, causing a serious risk that the jury was unable to make a reliable judgment about her guilt or innocence. We are unpersuaded.

The evidence at trial established that 135 checks from Tower Title and 90 checks from Performance Title, totaling $3,730,625.49, were issued to Hammond or his company during the course of the fraudulent scheme. The evidence further demonstrates that Johnston was the owner of the two title companies that handled most of the fraudulent real estate transactions and that she participated in some of the fraudulent transactions. Thus, even if Johnston was not directly involved in all aspects of the fraudulent scheme, it is clear that her criminal acts furthered the scheme. Therefore, we find no undue prejudice here.

Second, Johnston argues that she was prejudiced by her joint trial with Leffler, whose refusal to testify thwarted her ability to fully and fairly defend herself. Thus, according to Johnston, she was denied the availability of corroborating testimony regarding advice of counsel from Leffler. Johnston fails, however, to provide any reasonable basis for us to assume that Leffler would have

actually testified on her behalf at a separate trial or that his testimony would have been profitable for her defense. Accordingly, we find no reversible error in the district court's denial of the motion to sever on this basis.

C.

Concerning Leffler's motion to sever, he alleges that Johnston's handwriting expert was called for no other purpose than to attack Leffler on matters outside the indictment. According to Leffler, Johnston employed the handwriting expert to suggest Leffler's involvement in matters outside the government's case, mainly the forgery of Johnston' s signature on certain checks that were made payable to Leffler's company, Arch Property Services (ARP). The government had earlier raised questions about ARP for reasons unrelated to the checks.

We have reviewed the record, however, and are unable find any reversible error. Although neither the government nor Johnston suggested that Leffler forged the checks, there can be no question that there was an inference that Leffler was not entitled to the funds that were deposited into his account. Nevertheless, having "weigh[ed] the possible prejudice to the accused against the . . . equally compelling interests of the judicial process, which include[s] the avoidance of needlessly duplicative trials involving substantially similar proof [,]" Jamar, 561 F.2d at 1106, we are unable to conclude that the district court erred.

Leffler next maintains that Johnston's testimony exculpated Johnston while inculpating Leffler. According to Leffler, Johnston's testimony that she had in fact committed criminal acts, but only in reliance of Leffler's legal advice, prejudiced Leffler, thus denying him a fair trial. We find this contention to be without merit.

When the defendant neglects to demonstrate in what manner his defense "is irreconcilable with that of his co-defendant, there is no basis to grant the defendant's motion for severance." United States v. Spitler, 800 F.2d 1267, 1272 (4th Cir. 1986) (citation omitted).

Leffler's counsel contended at trial that Leffler believed that there were "legitimate business reasons" for his handling Hammond's real estate transactions in the manner that he did. (J.A. 399-401.) Thus, the jury was asked to believe that Leffler had no criminal intent when he helped process the transactions. Leffler also argues that he did not know of any of the illegal activities associated with the scheme.

As to the question of criminal intent, we are unable to fathom, and Leffler has failed to submit, how Leffler's defense that he believed Hammond's strategy to be legitimate is contradictory to Johnston's defense that she relied on Leffler's guidance. Therefore, Leffler has failed to meet his burden as to this issue.

Concerning Leffler's asseveration that he lacked knowledge of the illegal activities connected

with the scheme, it is indisputable that Leffler's defense on this issue conflicts with that of Johnston. "The mere presence of hostility among defendants, however, or the desire of one to exculpate himself by inculpating another are insufficient grounds to require separate trials, and thus, antagonistic defenses do not per se require severance even if the defendants attempt to cast the blame on each other." Spitler, 800 F.2d at 1271 (alteration marks, citations, and quotation marks omitted).

"To make such showing where severance has been sought on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that the differences are irreconcilable, and that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Id. at 1272 (alteration marks, citations, and quotation marks omitted). Leffler's failure to make such a showing is fatal to his argument on this issue.

V.

Johnston states that the district court erred in denying her motion for a new trial. We find this contention to be unavailing.

A.

We review a district court's denial of a Federal Rule of Criminal Procedure 33 motion for an abuse of discretion. United States v. Perry, 335 F.3d 316, 320 (4th Cir. 2003) "[A] court should exercise its discretion to grant a new trial sparingly . . . and . . . should do so only when the evidence weighs heavily against the verdict." Id. (internal quotation marks and citations omitted).

B.

Simply stated, the evidence before us does not weigh heavily against the verdict. In fact, the opposite is true. For instance, each of the HUD statements in the real estate transactions was false in as much as each listed the amount of money to be collected from the buyer/borrower, although neither Johnston nor her employees ever collected any of these funds. She also, on occasion, fraudulently broke the escrow and disbursed the lender's funds to Hammond, who would then purchase a cashier's check in the borrower's name. Thus, we are unpersuaded by Johnston's arguments on this issue. We also find Johnston's arguments concerning inconsistent verdicts futile. Hence, from our exhaustive review of the record in this matter, we

are unable to conclude that the district court erred in denying this motion.

VI.

Johnston maintains that the district court erred in denying her motion for judgment of acquittal. We are unpersuaded.

A.

We review de novo a district court's denial of a motion for judgment of acquittal. United States v. Gallimore, 247 F.3d 134, 136 (4th Cir. 2001).

To determine if there was sufficient evidence to support a conviction, we consider whether, taking the evidence in the light most favorable to the government, substantial evidence supports the jury's verdict. Glasser v. United States, 315 U.S. 60, 80 (1942) ("The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.").

Substantial evidence is defined as "that evidence which a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" United States v. Newsome, 322 F.3d 328, 333 (4th Cir. 2003) (quoting United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996)) . We review both the direct and circumstantial evidence and accord "the government the benefit of all reasonable inferences from the facts proven to those sought to

be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982) (citation omitted).

When reviewing claims of sufficiency of the evidence, "[t]he relevant question is not whether the appellate court is convinced of guilt beyond a reasonable doubt, but rather whether, viewing the evidence in the light most favorable to the government, any rational trier of facts could have found the defendant guilty beyond a reasonable doubt." Tresvant, 677 F.2d at 1021 (citations omitted).

B.

As we have already observed, even if Johnston was not directly involved in all aspects of the fraudulent scheme, it is clear that her criminal acts furthered the scheme. She owned the title companies that participated in the scheme and profited from the illegal activity. Without her participation, the scheme would not have succeeded. Therefore, we find no error in the district court's denial of this motion.

Johnston also argues that the district court's decision to reverse the order of counsel's closing argument as another reason that it should have granted Johnston a new trial. Johnston maintains that her defense was, in large measure, dependant upon the order of the closing argument. Johnston, however, neglects to posit how her counsel's argument would have differed if the order had been as Johnston wished. Hence, we have no basis on which to determine error.

VII.

Johnston asserts that the district court incorrectly calculated the amount of loss attributable to her. According to Johnston, the only evidence submitted by the government in support of the loss number was flawed. Moreover, Johnston argues that she was not provided with an opportunity to fairly litigate the issue of loss at her sentencing. We are unpersuaded.

A.

When reviewing the loss amount calculated by the district court, we review the factual findings of the district court for clear error, and its legal interpretation of the Sentencing Guidelines de novo. United States v. Parsons, 109 F.3d 1002, 1004 (4th Cir. 1997).

B.

The government presented evidence that the loss was between $2.5 million and $5 million, but the district court found it was between $1.5 million and $2.5 million; thus increasing the base level offense by 12 levels. Johnston fails, however, to reveal what she thinks the amount of loss to be. Given the facts of this case, we conclude that the district court made a reasonable estimate in making its loss calculation.

With adjustments for abuse of a position of trust and more than one victim/more than minimal planning, the Sentencing Guidelines calculation came to a level 22, with a sentencing range of 41-51

months. The district court departed downward, however, to correct sentencing disparity between the defendants. We find no error.

VIII.

Johnston maintains that the district court erred by allowing the government to ignore its statutory obligations regarding restitution. We find this error to be harmless.

A.

We review a restitution order for an abuse of discretion. United States v. Vinyard, 266 F.3d 320, 333 (4th Cir. 2001).

B.

It appears that the restitution information was not included in Johnston's presentence report as required by 18 U.S.C. § 3664. Nevertheless, testimony at trial and the business records were the basis for the district court's restitution determination. Thus, because Johnston had notice as to the amount of the restitution, as well as to whom it was payable, we are unable to find any reversible error. See United States v. Dando, 287 F.3d 1007, 1010 (10th Cir. 2002) ("Defendant . . . received the functional equivalent of the notice required by the statute."); United States v. Catoggio, 326 F.3d 323, 329-30 (2d Cir. 2003) (rejecting defendant's argument that because an order of restitution must be entered within 90 days of sentencing, the court

should vacate the restitution order without remanding for further proceedings).

Moreover, because Johnston fails to demonstrate actual prejudice from the government's failure to comply with the procedural requirements of § 3664, we are unable to find any error by the district court to be more than harmless.

> [T]he purpose behind the statutory ninety-day limit on the determination of victims' losses is not to protect defendants from drawn-out sentencing proceedings or to establish finality; rather, it is to protect crime victims from the willful dissipation of defendants' assets.... Mindful of these goals, we have ruled that a district court's failure to determine identifiable victims' losses within ninety days after sentencing, as prescribed by § 3664(d)(5) , will be deemed harmless error to the defendant unless he can show actual prejudice from the omission.

United States v. Zakhary, 357 F.3d 186, 191 (2d Cir. 2004). See also United States v. Johnson, 400 F.3d 187, 198-99 (4th Cir. 2005) (stating that the failure to abide by the ten-day limit in section 3664(d)(5) is harmless error absent a showing of prejudice); United States v. Vandeberg, 201 F.3d 805, 814 (6th Cir. 2000) (noting that not affording a defendant an opportunity to be heard as to the proposed amount of restitution within the ninety days prescribed by § 3664(d)(5) is harmless error because "the court

provided him ample opportunity to object to the amount thereafter"); United States v. Grimes, 173 F.3d 634, 638-39 (7th Cir. 1999) (holding that because intended beneficiaries of § 3664 (f) (1) (A) are victims, defendants have no rights under § 3664 and trial court's failure to name all of the victims in the restitution order is not error).

IX.

Uhrich submits that the district court erred in admitting evidence of certain real estate transactions. We reject the argument.

A.

The Court reviews an alleged error in the admission of evidence for an abuse of discretion. United States v. Gravely, 840 F.2d 1156, 1162 (4th Cir. 1988).

B.

Uhrich argues that the district court erred in admitting evidence concerning the Interprid Place and Coral Crest real estate transactions in violation of Rule 404(b) of the Federal Rules of Evidence. Our review of the record, however, convinces us that the district court admitted the evidence as "a part of a scheme that's alleged in the indictment . . . ." (J.A. 247 0-247 P.)

The record evidences that Hammond and Uhrich found large homes in which they wished to live, Interprid Place and Coral Crest respectively.

Hammond then diverted proceeds from his fraudulent scheme to help purchase these homes, and Uhrich provided the loans and the name Leandro Rivas, a fictional buyer.

Uhrich also borrowed $70,000 from investor/buyer Annette Porter, and then used those funds, along with money from Hammond, to buy Carol Crest. As a result, the mortgage lenders were left with mortgage notes signed by Rivas, a non-existent person. Uhrich also recruited other investors for Hammond's fraudulent scheme.

The Interprid Way and Coral Crest purchases provide overwhelming evidence of the criminal relationship between Hammond and Uhrich. Hammond may have led the fraudulent scheme, but it is clear that Uhrich was a part of it. Accordingly, we can find no error as to the district court's admission of this evidence.

X.

According to Uhrich, he was sentenced in violation of the Sixth Amendment to the Constitution. We are unable to agree.

A.

Consistent with the mandate of United States v. Booker, 543 U.S. 220 (2005), we follow the unreasonableness standard in our review of an original sentence. United States v. Hughes, 401 F.3d 540 (4th Cir. 2005); United States v. Green, 436 F.3d

449 (4th Cir. 2006); United States v. Davenport, 445 F.3d 366 (4th Cir. 2006).

B.

Uhrich contends that the district court violated his Sixth Amendment rights by relying on facts that were not found by the jury nor admitted by Uhrich; specifically, the amount of loss arising out of Interprid Way. Consequently, according to Uhrich, the district court imposed an improper sentence.

This argument, however, contradicts the statement of Uhrich's counsel at Uhrich's sentencing hearing when he stated that the amount of loss for Interprid Way was not included in the amount of loss attributed to Uhrich. (J.A. 2630.) Instead, the amount of loss appears to have been wholly based on the losses resultant in the actions of the investors whom Uhrich recruited to participate in the fraudulent scheme. Id. Therefore, we reject this argument.

Uhrich also maintains that his sentence is unreasonable pursuant to Davenport. As the district court stated, however,

> [W]hile I think the government has made a very substantial showing that would justify the Court's conclusion that the amount of loss was more than $800,000 in Mr. Uhrich's case, out of an abundance of caution, in an effort to give the defendant absolutely the benefit of any doubt, not just reasonable

> doubt, I am going to go to the next level and treat Uhrich as having caused the loss, foreseen and contemplated a loss of more than $500,000 but not more than $800,000.
>
> So, that will reduce the final offense from a level 19, subject to any other consideration, from a level 19 to a level 18.

(J.A. 2632.) Based on Uhrich's criminal history category III, his final guideline range was 33-41 months. The trial court imposed a 33 month sentence. Hammond, the mastermind of the fraudulent scheme, was given a 37 month sentence.

Comparing the roles of Hammond and Uhrich, it may appear at first blush that Uhrich's sentence is unreasonable. We observe, however, that Hammond pled guilty, cooperated with the government, and testified at trial, thus reducing his offence level. Also, unlike Uhrich, Hammond had no prior convictions. Hence, we find the sentence to be reasonable.

XI.

Accordingly, for the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

United States District Court
District of Maryland
[Entered: April 29, 2005]

JUDGMENT IN A CRIMINAL CASE
(For: Offenses Committed on or
After November 1, 1987)

UNITED STATES OF AMERICA

v.

FREDRIC D. LEFFLER (6)

Case Number: AMD-03-0010
USM Number:
Defendant's Attorney: Norman Smith
Assistant U.S. Attorney: Joyce McDonald
and Stephen Schenning

THE DEFENDANT:

_____pleaded guilty to count(s)_____

_____pleaded nolo contendere to count(s)_____, which was accepted by the court.

__X__was found guilty on counts 3,4,5,6,7,8,9,10, 11,12,13,14,15,16,17,18,19 Superseding Indictment after a plea of not guilty.

Title & Section
18: U.S.C. § 1343
18: U.S.C. § 1341

Nature of Offense
Wire Fraud
Mail Fraud

Date Offense Concluded
November 25, 1998
June 29, 1998

Count Number(s)
3 thru 12, & 18
13 thru 17, & 19

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by U.S. v. Booker, 125 S. Ct. 738 (2005).

_____The defendant has been found not guilty on count(s)_____

_____Count ___ is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

April 29, 2005
Date of Imposition of Judgment

/s/Andre M. Davis 4/29/2005
ANDRE M. DAVIS Date
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 37 months, as to each count, to run concurrent for a total term of 37 months.

__X__ The court makes the following recommendation to the Bureau of Prisons:

__X__ That the inmate be placed in a facility consistant with his security level that is as close as possible to: Morgantown, West Virginia.

_____ The defendant is remanded to the custody of the United States Marshal.

_____ The defendant shall surrender to the United States Marshal for this district:

_____ at ___ a.m./p.m. on _____

_____ as notified by the United States Marshal.

__X__ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

__X__ before 2 p.m. on Friday, June 17, 2005 .

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. § 3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. § 3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. § 3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY U.S. MARSHAL

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$1700.00	$Waived	$Reserved

____If applicable, restitution amount ordered pursuant to plea agreement.....$

FINE

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the 15th day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

_X__The court has determined that the defendant does not have the ability to pay a fine; therefore, a fine is waived.

____The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

_____The interest requirement is waived.
_____The interest requirement is modified as follows:

RESTITUTION

__X__ The determination of restitution is deferred for Ninety (90) days. An Amended Judgment will be entered after such determination.

_____ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee

Amount of Restitution Ordered

Priority Order or Percentage Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; and (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. _X_ Special Assessment be paid in full within 30 days.

B. ____$_____ immediately, balance due (in accordance with C, D, or E); or

C. ____Not later than _____; or

D. ____Installments to commence _____ day(s) after the date of this judgment.

E. ____In _____ (*e.g. equal weekly, monthly, quarterly*) installments of $_____ over a period of _____ year(s) to commence when the defendant is placed on supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties except those payments made

through the Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the Clerk of the Court..

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

_____in equal monthly installments during the term of supervision; or

_____on a nominal payment schedule of $_____ per month during the term of supervision.

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

_____Joint and Several with:

_____The defendant shall pay the following costs of prosecution and/or court costs:

_____The defendant shall forfeit the defendant's interest in the following property to the United States: